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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HARRY K. SINGLETARY, JR.,

Petitioner,

vs.

LLOYD DUEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

[WHETHER] A PANEL DECISION OF THE ELEVENTH CIRCUIT OF APPEALS WHICH FOUND HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENT IN BRECHT V. ABRAHAMSON, 507 U.S. ___, 113 S. CT. 1710, 123 L.FD.2D 353 (1993).

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

PROCEDURAL HISTORY AND STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 12

THE ELEVENTH CIRCUIT THOROUGHLY ANALYZED THE RECORD, FLORIDA LAW, THE JURY INSTRUCTIONS, AND THE JURY'S REQUEST TO SEE THE VACATED CONVICTION DURING ITS DELIBERATION. THE ELEVENTH CIRCUIT'S CONCLUSION THAT HABEAS RELIEF SHOULD ISSUE RESULTED BECAUSE THE EIGHTH AMENDMENT ERROR WAS IN FACT HARMFUL. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Brecht v. Abrahamson,
113 S. Ct. 1710 (1993) 2

Cooper v. State,
581 So. 2d 49 (Fla. 1991) 3

Duest v. Dugger,
555 So. 2d 849 (Fla. 1990) 2, 12

Duest v. Singletary,
967 F.2d 472 (11th Cir. 1992) 1

Duest v. Singletary,
997 F.2d 1336 (11th Cir. 1993) 2

Duest v. State,
462 So. 2d 446 (Fla. 1985) 12

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 10

Hall v. State,
541 So. 2d 1125 (Fla. 1989) 4, 10, 15

Johnson v. Mississippi,
486 U.S. 578 (1988) . . . . . i, 1

Johnson v. Singletary,
____ So. 2d ____, No. 81,121
(Fla. January 29, 1993) 10

Kotteakos v. United States,
328 U.S. 750 (1946) 12

Lowery v. Collins,
996 F.2d 770, 773 (5th Cir. 1993) 13

Orndorff v. Lockhart,
998 F.2d 1426 (8th Cir. 1993) 12

Parker v. Dugger,
111 S. Ct. 731 (1991) 4

Singletary v. Duest,
113 S. Ct. 1940 (1993) 2

Stringer v. Black,
112 S. Ct. 1130 (1992) 15

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Lloyd Duest, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Eleventh Circuit Court of Appeals in this case. That opinion is reported at 997 F.2d 1336 (11th Cir. 1993).

OPINIONS BELOW

In Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), the Eleventh Circuit issued an opinion ordering sentencing relief on the basis of the violation of Johnson v. Mississippi, 486 U.S. 578 (1988), which occurred in Mr. Duest's case. The Florida

Supreme Court had found a violation of Johnson occurred in Mr. Duest's penalty phase proceedings. Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). Before the Eleventh Circuit, the State had conceded that Johnson error occurred. Duest v. Singletary, 967 F.2d at 480. The Eleventh Circuit found the Johnson error warranted habeas relief. This Court vacated the decision of the Eleventh Circuit and remanded for reconsideration in light of Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). Singletary v. Duest, 113 S. Ct. 1940 (1993). On remand, the Eleventh Circuit after considering Brecht again ordered habeas relief. Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State of Florida recited the Eighth, Tenth and Fourteenth Amendments as the constitutional provisions involved. Mr. Duest agrees that the Eighth and Fourteenth Amendments are involved.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This is a habeas corpus action initiated by a Florida death-sentenced inmate. The state courts found and the State conceded Eighth Amendment error at Mr. Duest's penalty phase proceeding before his jury when the State introduced a prior conviction for aggravated assault with intent to murder.[1] After asking that the

[1]In its petition for a writ of certiorari, the State of Florida has taken a position at odds with its concession below. (continued...)

prior conviction be read a second time, the jury recommended death by a vote of seven to five.[2] Subsequently, that prior conviction was vacated and nolle prossed because it was determined that under the applicable law Mr. Duest had not committed the crime of aggravated assault with intent to murder. At Mr. Duest's penalty phase proceeding, the only evidence presented to support this prior conviction was the fact of conviction. Before the Eleventh Circuit the State of Florida agreed that Johnson error had occurred.

Mr. Duest's jury was instructed to weigh the aggravating and mitigating evidence in deciding what sentence to recommend: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence" (R. 1799).[3] After being so instructed, the jury asked to see Mr. Duest's prior convictions. Thereupon, the

---

[1](...continued)
Compare ("In all material respects, no Johnson violation occurred because the aggravating factor, § 921.141(5)(b), Fla. Stat., was proven beyond a doubt, a prior violent felony was proven to the jury") Petition at 11; with ("Duest cannot establish that a defect in some of the evidence presented to support a factor that remained valid absent the defect, coupled with three other aggravating factors, had an injurious effect in his sentencing determination.") Supplemental Brief of Harry Singletary dated June 18, 1993.

[2]Under Florida law, had one juror voting for death switched and voted for life, a life recommendation would have resulted. Cooper v. State, 581 So. 2d 49 (Fla. 1991).

[3]The State in its petition before this Court completely ignores the fact that the jury was instructed to "weigh the aggravating and mitigating evidence" (emphasis added).

judge read to the jury the judgments reflecting that Mr. Duest had committed an aggravated assault with intent to murder two individuals. Only after again hearing this materially erroneous evidence a second time did the jury return a seven to five death recommendation.

The State erroneously sets forth in its petition: "the trial court found no mitigating evidence applied to the case." Petition at 4.[4] In the findings of fact issued by the sentencing judge at the time the sentence of death was imposed, the judge did not find any statutory mitigating factors applied (R. 1835). However, the order did not address non-statutory mitigation (R. 1835-36). Instead, the judge stated: "this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating [circumstances]" (R. 1836).[5]

In post-conviction proceedings, Mr. Duest raised a claim concerning whether the sentencing judge considered the non-statutory mitigating which had been presented by Mr. Duest at trial. The State and the sentencing court responded that "plenty" of mitigation had been presented to the jury and

---

[4]Of course under Florida law, the question of prejudice focuses not upon what the judge found, but rather upon "whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989).

[5]This language should be compared to the language of the sentencing order at issue in Parker v. Dugger, 111 S. Ct. 731, 736 (1991)("There are no mitigating circumstances that outweigh the aggravating circumstances").

considered by the judge at Mr. Duest's sentencing (PC R. 121). In the state post-conviction proceedings, the sentencing judge stated:

> THE COURT: The court was aware of the fact there was drug abuse.
>
> * * *
>
> THE COURT: I was aware of that, where the family testified during the trial.
>
> MR. McCLAIN: That was nonstatutory mitigation, that was before the jury as well, because the jury heard the testimony about the drug abuse, and I believe the father testified about taking him to Methadone treatment and so forth.
>
> THE COURT: Yes, he did.
>
> * * *
>
> THE COURT: There were also factors where the mother was saying how physically ill he was as a baby and whatever else. I mean I heard all of that. I think I have to say I considered it, but I will go through all the cases again. And I remember that, because I didn't see it anywhere, but I remembered that the family testified to, beyond the presentence investigation relayed because they were there at the sentencing phase as well, and did testify at that time.
>
> So, we are talking about physical and mental and stress, and drug abuse, and prison time.

(PC R. 119-22)(emphasis added).

In its post-conviction answer brief to the Florida Supreme Court, the State conceded that "evidence of [Mr. Duest's] prior drug history, therapeutic interventions and status as a good father, husband, son and brother" were presented to the jury (Answer Brief from Denial of a Motion for Post Conviction Relief at 37). Both statutory and nonstatutory mitigating circumstances were in fact set forth in the record. In the penalty phase

proceeding, the State conceded that Mr. Duest had a history of debilitating drug abuse (R. 1607). The State conceded that he had helped an inmate:

> What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest mentioned to you that he helped an inmate once. Consider that. Consider anything else that was brought out along that line.

(R. 1615). The prosecutor was referring to an incident in Walpole prison where Mr. Duest assisted a guard who was giving aid to an inmate who had been stabbed:

> I don't have much more to say except he has helped people in prison when he was there. He helped a guard with a prisoner that had been stabbed. He went out and him and another person took him to the hospital. The guard couldn't go into the section. He was serving time at that time. He just waited there at the hospital and he didn't escape or anything. He waited for the prisoner to go back with the guard back to prison.

(R. 1578-79). In regard to Lloyd's serious drug abuse history, his father testified:

> A I brought him to a drug clinic. I believe it was in Cambridge, Cambridge, Mass. He had another drug problem a little later and brought him - trying to bring him to another one. He couldn't get into one because they were all filled. He has got a young daughter.

(R. 1578). The State also conceded that there was testimony that Mr. Duest was a good father (R. 1615-16). The State conceded that these were mitigating factors.

The State conceded that there was evidence upon which the sentencer could find the influence of extreme mental or emotional disturbance in that Mr. Duest had a long-standing drug problem (R. 1607). There was also additional evidence in the record

which would have supported the impairment factor as well as extreme disturbance in that Mr. Duest detailed a lengthy psychiatric history:

> MR. BARON: There were two other things he brought to my attention.
>
> One was concerning any psychological history. He indicated to me that he told Miss Balazik that while in Walpole and in -- what was the other prison?
>
> THE DEFENDANT: Concord. I transferred from Walpole to Concord.
>
> MR. BARON: -- he had seen a psychiatrist and been in some kind of therapy. One of them is mentioned in the PSI, I believe the Walpole one, but the Concord one is not mentioned, neither one. My understanding, none of the doctors, from what I'm told, still work within the prison or prison system, so whether or not they would have added anything is unknown at this time.
>
> THE COURT: So there is an omission of one, the Concord one. You have the Waltham one in here, right?
>
> MS. BALAZIK: Yes.
>
> MR. BARON: And the one he's been seeing within the Broward County jail is listed in there.
>
> THE DEFENDANT: I saw a psychiatrist of two years, once a week, one on one, from 1971 to 1973, and I guess three years later I was arrested for illegal possession of a firearm. My parole was violated on account of the arrest.
>
> I was sent to Walpole, did 14 months, went to trial and was found not guilty, and during that 14-month span of time, I also saw a psychiatrist.
>
> MR. BARON: In addition, he indicated that he gave Miss Balazik a number of additional places that he had worked for whatever period of time that are not included within the PSI. I don't know if it was because they were not confirmed or what the situation was.

(R. 1662-63).

Numerous additional nonstatutory mitigating evidence was present in the record. Mr. Duest's father testified that his son Lloyd had been an excellent son, and that Lloyd got diplomas while in prison for counseling younger drug addicts (R. 1577). His sister testified that he had been a good brother (R. 1582). His mother said her son, Lloyd, was lovable and compassionate, that he was a quiet boy and never a discipline problem at school (R. 1583-84). His wife testified that he had been a good husband and father (R. 1587). Mr. Duest worked on his parent's home, always gave Christmas gifts except for the time when he was on escape status, and loved his family (R. 1671). During his time in the Broward County Jail, Mr. Duest made a significant contribution to group therapy sessions:

> Mental: Records from Walpole State Prison indicate that the subject was seen in 1971 by a prison psychologist on a one to one basis. However, no clinical diagnosis was ever made. The subject is currently in group therapy sessions in Broward County Jail. According to Psychotherapist Gary B. Lane, Lloyd contributed to the group by assisting other inmates in problem solving, bringing numerous newspapers and magazine articles to be shared by the group and actively participating verbally in group interactions. He states that his participation acted as a role model for others to do the same. As a group therapy member, Mr. Duest made a significant contribution to the effectiveness of the sessions.

(R. 1811). Mr. Duest was not known for violence and to the contrary had a reputation for respect of his family and friends, and helping others:

> Friend, Edward R. Lavache, states, "I am a Watertown firefighter and have been a friend of Lloyd Duest for over ten years During this time I have never known Lloyd to do harm to anyone. I do not believe he would ever take the life of another person. I have always

known him to be a loving father and husband, he has always shown the greatest respect for his family and friends. He has always helped me whenever possible and I've never seen him turn down a friend."

(R. 1813). Mr. Duest was characterized as a good worker:

Friend, James Pallone, states, "I would like to write this Recommendation for Lloyd Duest who I have known all my life. He has always been in good standing and shown Character with my family and his community within the last 25 years.

He has worked for my [sic] for 10 years and was prompt at his job. He showed responsibility and character in his job, and always got along with his fellow workers.

If there is anything I could do or testify to in his behalf please do not hesitate to contact me."

(R. 1813). In fact, the probation officer, who authored a presentence investigation that the judge considered, concluded that Mr. Duest did satisfy mitigating factor (8) in that "he does has [sic] a very supportive family, friends and members of the community in Massachusetts" (R. 1816).

The State conceded in state court that "plenty" of mitigating evidence was presented to the jury (PC-R. 121). It was this mitigating evidence that the jury was told to weigh against the aggravating evidence. The jury was only able to reach a verdict after hearing materially inaccurate aggravating evidence a second time.

Under Florida law, a jury's recommendation of life is binding if there exists a reasonable basis for the recommendation in the record. Hall v. State, 541 So. 2d 1125 (Fla. 1989). A "Florida penalty phase jury is a co-sentencer under Florida law." Johnson v. Singletary, 612 So. 2d 576 (Fla. 1993). As a result,

the Eleventh Circuit concluded that if one juror voting for death had instead voted for a life, a different sentence would have resulted. This is because the wealth of mitigating evidence contained in the record would have provided a life recommendation with a reasonable basis. The Eleventh Circuit then concluded that the circumstances here demonstrated that the Johnson error had a substantial influence:[6]

> Several facts persuade us that such a likelihood exists. Most important, Duest's sentencing jury was permitted to consider evidence that was materially inaccurate; the jury did not merely consider properly-admitted evidence in an improper way. That un-constitutional evidence -- a subsequently over-turned conviction for armed assault with intent to murder -- helped portray Duest to the jury not only as an individual with a propensity for criminal violence, but as a recidivous killer. As we previously wrote: "The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death." *Duest v. Singletary*, 967 F.2d 472, 482 (11th Cir. 1992), *vacated on other grounds*, 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). Furthermore, the jury requested to see the vacated convictions

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[6]The Eleventh Circuit did not address Mr. Duest's other challenges to his death sentence because of its decision to grant relief for the Johnson error. In the unlikely event that this Court were to grant certiorari review and reverse, consideration of the these remaining issues would be required. These issues include Mr. Duest's claim that his jury received instructions in violation of Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Duest's jury received the same instruction at issue in Espinosa. The state courts applied a procedural bar which the District Court ruled was inadequate. An analysis of the harmlessness of the Johnson error should include consideration of the other Eighth Amendment errors which infected the process. If certiorari review is granted, Mr. Duest argues that consideration of other Eighth Amendment error must be included in the harmless error analysis.

> after having deliberated for some time. This fact "suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence." Id. Although it is unclear how much time elapsed between the jury's request and its arrival at a recommendation of death, the fact that the sentencing hearing took only one day, when combined with the circumstances surrounding the jury's decision, further calls into question the reliability of the jury's recommendation. Id. We recognize that the State established three valid aggravating circumstances. Nevertheless, especially when viewed in the light of the close jury vote and the mitigating circumstances, we believe the facts discussed indicate that at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction.

Duest v. Singletary, 997 F.2d at 1339-40.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT THOROUGHLY ANALYZED THE RECORD, FLORIDA LAW, THE JURY INSTRUCTIONS, AND THE JURY'S REQUEST TO SEE THE VACATED CONVICTION DURING ITS DELIBERATION. THE ELEVENTH CIRCUIT'S CONCLUSION THAT HABEAS RELIEF SHOULD ISSUE RESULTED BECAUSE THE EIGHTH AMENDMENT ERROR WAS IN FACT HARMFUL.

The issue presented here is simply not worthy of certiorari review. The Eleventh Circuit engaged in a rather routine Brecht analysis.

Regarding trial errors, Brecht held that in habeas corpus proceedings, "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the

jury's verdict.'"[7] 113 S. Ct. at 1714, quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).

As Kotteakos explained:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-65 (footnote omitted). The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong . . . in the total setting." Id., quoting Kotteakos, 328 U.S. at 764. See also Brecht, 113 S. Ct. at 1724 (Stevens, J., concurring).[8]

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[7]Mr. Duest does not concede that the error herein was merely trial error. The Florida Supreme Court found Eighth Amendment error, but then applied an automatic affirmance rule ("even if we were to find that one or two aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty." Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990), quoting Duest v. State, 462 So. 2d 446, 450 (Fla. 1985). This was structural error in the state court process. See Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993).

[8]Moreover, under Brecht, the beneficiary of the error bears the burden of establishing harmlessness. Although the Eleventh Circuit did not place this burden upon the State of Florida, it should have. Justice Stevens emphasized that the Kotteakos standard "places the burden on prosecutors to explain why those errors were harmless" and observed, "Kotteakos plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution." 113 S. Ct. at 1723 (Stevens, J., concurring). The Fifth Circuit has held that Brecht requires the (continued...)

Additionally, under Brecht, the habeas court must conduct a de novo review of the entire record in assessing whether or not the error was harmless. Lowery, 996 F.2d at 773. The Kotteakos standard requires a reviewing court to "make a de novo examination of the trial record" in order to "consider all the ways that error can infect the course of a trial." 113 S. Ct. at 1724 (Stevens, J., concurring).

The Eleventh Circuit conducted a de novo review of the entire record and concluded that given Florida law, substantial influence existed:

> Several facts persuade us that such a likelihood exists. Most important, Duest's sentencing jury was permitted to consider evidence that was materially inaccurate; the jury did not merely consider properly-admitted evidence in an improper way. That un-constitutional evidence -- a subsequently over-turned conviction for armed assault with intent to murder -- helped portray Duest to the jury not only as an individual with a propensity for criminal violence, but as a recidivous killer. As we previously wrote: "The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death." *Duest v. Singletary*, 967 F.2d 472, 482 (11th Cir. 1992), *vacated on other grounds*, 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). Furthermore, the jury requested to see the vacated convictions after having deliberated for some time. This fact "suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence." Id. Although it

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[8](...continued)
prosecution to establish harmlessness. Lowery v. Collins, 996 F.2d 770, 773 (5th Cir. 1993).

> is unclear how much time elapsed between the jury's request and its arrival at a recommendation of death, the fact that the sentencing hearing took only one day, when combined with the circumstances surrounding the jury's decision, further calls into question the reliability of the jury's recommendation. Id. We recognize that the State established three valid aggravating circumstances. Nevertheless, especially when viewed in the light of the close jury vote and the mitigating circumstances, we believe the facts discussed indicate that at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction.

Duest v. Singletary, 997 F.2d at 1339-40.

The State cannot establish that the errors had no "substantial and injurious effect or influence" on the jury's verdict. The jury was told: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence" (R. 1799). Thereafter, while deliberating, the jury requested to hear for a second time the prior convictions read to it. Only then was a seven to five death recommendation returned.

Additionally, because Florida sentencers weigh aggravating evidence against mitigating evidence, the existence of mitigating evidence in the record also shows that the State cannot establish that the erroneous instructions were harmless. Mitigating evidence establishing a reasonable basis for a life recommendation was in the record. The extra aggravating evidence on death's side of the scale thus could not but have had "substantial and injurious effect or influence" on the jury's

balancing of aggravating evidence and mitigating evidence. See Stringer v. Black, 112 S. Ct. 1130 (1992). Moreover, if the jury had recommended life, the mitigating evidence in the record would have precluded an override. Hall v. State, 541 So. 2d 1125 (Fla. 1989). The Eleventh Circuit's conclusion was properly premised upon a review of the entire record and Florida law.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 25, 1994.

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